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WHAT CONSTITUTES A TAKING OF PRIVATE PROPERTY
FOR A
P U B L I C U S E .

#####

THESIS PRESENTED FOR THE DEGREE OF MASTER OF LAWS

BY

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#####

CORNELL UNIVERSITY

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I N T R O D U C T I O N .

The student of the law of Eminent Domain cannot but be impressed at the outset with the magnitude of the questions involved, and the vast amount of attention that they have received in the courts of the Country. The cases number many thousand, and form a vast and confusing mass of material from which it is a difficult matter to choose the best and eliminate that which possesses least merit. Among the important sub-divisions of Eminent Domain is found the question: "What constitutes a taking of private property for a public use ?", and I shall endeavor to answer this question to the best of my ability, realizing the immensity of the task and the necessary brevity of this article. It has been impossible to examine all the cases under each head, or to make copious extracts from opinions, so I have been obliged to confine myself largely to bare statements of fact, illustrating each by a case or two from leading jurisdictions. In this work and in general arrangement of ideas I have consulted and am especially indebted to "Lewis on Eminent Domain", "Mills on Eminent Domain" "Cooley's Constitutional Limitations", and the "American and English Encyclopedia of Law". My plan has been to give as briefly as possible a short account of those necessary principles of Eminent Domain upon which this subject rests, in my first

chapter, followed by other chapters on property and taking in general, land, streets and highways, and water and watercourses, somewhat after the plan adopted by Mr Lewis in his estimable work on Eminent Domain. While at best my treatise of the subject has been general, few, if any leading principles have been neglected. We will now proceed to a discussion of the subject involved.

CHAPTER I .

GENERAL FEATURES OF EMINENT DOMAIN.

Distinguished from taxation and the police power. It is an absolute necessity, from the very nature of Government, that every sovereignty should possess buildings, land and other property which it holds for the use of its officers and agents to aid them in performing their public function. Land may also be needed to provide for public defence, internal improvements, or other objects necessary to carry out the purposes of government. This land must be held by the state, as property is held by the individual, and such property constitutes the ordinary domain of the state. Inherent in sovereignty are certain powers and rights. Some of these rights are complete without any action on the part of the state, e.g., the right of navigation of the seas, rivers, lakes, etc., the right of fishery in public waters, the right to precious metals etc., but other rights become complete only when the state has displaced the rights of private individuals and has assumed control itself. This may be accomplished by two methods:

1. By contract with the individual owner, and
2. By appropriating his property.

With the first of these methods we have nothing to do, but with the second, everything, for this method of appro-

priating private property to the state is called "Eminent Domain". "Eminent Domain is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare, may demand" (a)

The theory upon which this power is exercised is that all property ultimately rests in the state, and the state in exercising eminent domain is only resuming its own again. But this power must not be confounded with powers of taxation or police powers which are also inherent in sovereignty. "The police power is that inherent and plenary power in the state which enables it to impose such wholesome restraint upon the exercise of private rights as will prevent the infliction of injuries on others in the enjoyment of their rights" (b)

To put it briefly -to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with the like enjoyment of rights by others. "Taxation is the authority vested in every sovereign state to compel contributions from persons and property for public purposes. It is a burden imposed by the legislative power upon persons or property, to raise money for public purposes (c).

(a) Vattel, Chap. 20 #34

(b) Cooley's Const. Lim. p. 704.

(c) Blackwell on Tax Titles, p 1.

From these definitions we can readily see that neither the power to ~~tax~~, or the police power, are identical with the power of eminent domain, which deprives a man of his property, sometimes entirely divesting him of title thereto, upon making suitable compensation to him therefor.

By whom exercised in the United States. From the peculiar nature of our government we are sometimes at a loss to know just where the power to exercise the right of eminent domain lies. We have two distinct and separate sovereignties existing within the same territory, each restricted in the exercise of its powers by the Constitution of the United States(a). For a summary of the powers that each may exercise see The Cornell Law Journal of June 1894, p.16, as follows:

" I. By virtue of its right of Eminent Domain a state may take for public use:

1. Private Property within the state.
2. Property already impressed with a public use by the state.
3. Property of the United States ~~with~~in a state, (whether already impressed with a public use or not. Query.)
4. Property already impressed with a public use by the United States. Query.

II. The United States has likewise the Right of Eminent Domain to take for a public use:

(a)

Ableman v Booth, 21 Howard 623.

1. Private property whether in territory over which it has exclusive jurisdiction, or within a state.
2. Property already impressed with a public use by the United States, (or a state. Query.)
3. Property of a state, (whether already impressed with a public use or not. Query.) " (Subject always to the limitation that it must be for a proper public use) (a)

To exercise this power of eminent domain some legislative action is necessary, both when exercised by the United States or by the states. In the Federal Government Congress has the sole power to authorize, but in the states this is exercised by the legislature, which decides what shall be a proper public use. The methods and procedure to be followed in the taking are prescribed by these bodies, the usual method being to appoint a board of commissioners who determine and assess the damage, although in some cases a jury is allowed (b):

This power may be delegated. The right to exercise this power may be delegated to private corporations, which, although essentially organized for private gain, stand in such a relation to the public that they may be considered as promoting the public convenience, or carrying on work of general public utility. Such are railroad companies, bridge and turn-pike

(a) Kohl v United States, '91 U.S. 367. Cherokee Nation v South Kansas Ry Co. 135 U.S. 641.

(b) Cooley's Const. Lim. p. 538
People v Smith, 21 N.Y. 595.

corporations, and the like. The public necessity or convenience is the test as to whether the power may be delegated. or not. (a)

The purpose. The purpose for which the power of eminent domain is to be exercised must be public and not merely for the benefit of a private person, although private gain will not defeat the power, if it actually concerns or promotes the welfare, comfort, or convenience of the whole people. There is no power to compel the taking of property from one man and a giving to another for his sole private use, even though he make just compensation (b). In any case the question as to whether a given use is a public one is a judicial question and must be determined by the Court (c).

What property can be taken. The property contemplated by the Constitution, is anything that the law recognizes as such, and, in respect to which, the owner is entitled to a remedy against anyone who disturbs him in the enjoyment thereof. This property may be tangible or intangible, and the interest in it temporary or permanent, but if taken the owner is entitled to compensation. (d)

Compensation. One of the great principles upon which the exercise of eminent domain rests is compensation. No man can

(a) Beekman v Saratoga R.Co. 3 Paige 45. Secombe v Railroad Co. 23 Wallace, 108.

(b) Tyler v Beecher, 44 Vt. 648. Bankhead v Brown, 25 Ia, 540

(c) For a full list of purposes adjudged public, see Stimson's American Statute Law #1141 and cases.

(d) See post.

be deprived of his absolute rights without some reparation made him. It is true that private rights must yield to the superior necessities of the public as a whole, but the public must pay for the increased benefits which it receives. The right to compensation, although guaranteed by the Constitution itself, does not depend upon it, but upon the inherent right in the individual. Therefore we may safely say that in all cases where there has been a taking, compensation must be made.

Constitutional Limitations. In the Constitution of the United States, and in each of the state constitutions (a), provisions have been inserted governing and limiting the exercise of the power of eminent domain. These provisions are generally exemplified by the two leading limitations in the Federal Constitution. From Article V of the Amendments we find these words "NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION!" Section one of the XIVth Amendment adds "Nor shall any state deprive any person of life, liberty, or property, without due process of law"

These constitutional limitations upon the power of eminent domain, are seemingly very plain and definite, but there are,

(a) One exception - North Carolina.

nevertheless,important ambiguities. These are found in the word "taken" and in the phrases "public use" and "just compensation". With the questions as to what constitutes a public use,and when just compensation has been made,we are not to deal. The other question, "What constitutes a taking ?",forms the basis of this article and the question with which we are to deal in subsequent chapters.

C H A P T E R I I

PROPERTY AND TAKING IN GENERAL.

Methods of Taking. There are two classes of cases which are held to constitute a taking of private property. The one where the fee to the property itself has been taken (a), the other where the property itself remains intact, but some act done by legislative authority imposes an additional burden upon the property and so causes it to deteriorate in value (b). In both cases the owner of the property taken is entitled to compensation, and in the first class of cases there is little difficulty; with the second class we find more trouble, for Courts will differ as to whether an additional burden is sufficient or not to amount to a taking. Such burden may consist of a real, structural, or physical injury to the property or an interference with certain rights appurtenant thereto, or enjoyed in connection therewith, or a mere deterioration in value. We will now proceed to a discussion of these various additional burdens, and determine to our own satisfaction at least, whether they constitute such a taking as is contemplated by the Constitution.

Property. To determine what constitutes a taking of property

(a) Cushman v Smith, 35 Me. 247.

(b) People v Haines, 49 N.Y. 587. Pumpelly v Green Bay Co.
13 Wall. 166.

it becomes necessary to determine what property actually is. In a loose acceptation of the term property is often reckoned as the thing itself, but is this true? Long before the advent of man, animals in a state of nature roamed upon the land. With the coming of man the land was reduced to his dominion, and certain animals to domesticity. In this no corporeal change was produced in the land and animals themselves, but, nevertheless, they had now become property, by the act of man in reducing them to possession. He had obtained rights over them subject only to the superior right of the common good, and the fact that he must use that which he had in a manner not interfering with the rights of others. His property consists not in the things themselves, but in the right he has over them, and this is the only meaning of property that we can accept under the Constitution. The sovereign people who ordained and declared our Constitution said "You must not take our private property for public use without making us a just compensation therefor," and by this they meant not only corporeal things but also that bundle of rights pertaining thereto.

Changes in the Law. The law as to what constitutes a taking has undergone a great change in the last half century. The Supreme Court of Maine, in 1852, said "The design appears simply to declare that private property shall not be changed to public property or transferred from the owner to others for a public use without just compensation (a).

(a) Cushman v Smith, 34 Me 247.

This view seems to exclude all idea of consequential damage to property and may be reckoned as a fair statement of the law existing at that time, but this view has gradually changed, and the case contributing most to this change is *Eaton v B.C.&.M RR.Co (a)*. The defendant railroad company had laid out its road through plaintiff's farm, and had paid assessed damages. In constructing their road they cut through a ridge near the farm, and a freshet carried gravel through the cut thus made, and covered plaintiff's farm, spoiling the land for agricultural purposes. In an action brought to recover damages, it was held that he ought to succeed. The Court said "Property is the right of any person to possess, use, enjoy, and dispose of a thing. If property in lands consists of certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference takes, pro tanto, the owner's property Two, marked characteristics distinguish this injury from that described in many other cases. First, it is a physical injury to the land itself, a physical interference with the rights of property, an actual disturbance of plaintiff's possession. Second. It would clearly be actionable if done by a private person without legislative authority." The plaintiff had a right to the protection of the natural barriers against the

overflow of the river. The acts of the defendant company in breaking that barrier amounted to a taking for which he was entitled to compensation.

Two years later the same court reviewed this case, and affirmed the principle in even stronger language in *Thompson v Androscoggin Improvement Co.*(a), and other courts have followed almost universally. So we may regard it as settled law that an actual dispossession is not necessary if there has been such an actual interference with the property as to deprive of valuable rights.

(a) 54 N.H.545.

"Depriving an owner of property of one of its essential attributes is depriving him of valuable rights, and renders compensation necessary"

People v Otis, 90 N.Y.48, at p 52.
Pumpelly v Green Bay Co., 13 Wall.166.
Connif v San Francisco, 67 Cal.45
Grand Rapids Booming Co. v Jarvis, 30 Mich.308.
Seifert v Brooklyn, 101 N.Y.136.
Lahr v Met. Elevated Co. 104 N.Y.268.

C H A P T E R I I I

WHAT CONSTITUTES A TAKING.

LAND.

Value of English Precedent. Many cases concerning the question as to what constitutes a taking of land for a public use have arisen in England, but it is not the purpose of this treatise to give much attention to such cases. Indeed, most of them are inapplicable to our different system of government. In England Acts of parliament are the supreme power of the land. Courts cannot declare a wrong what an act of Parliament has made lawful, if the Act of Parliament has been faithfully executed. In the United States a legislature is powerless to make lawful that which the Constitution prohibits. When the execution of a public work causes damage, in the United States, the Courts not only inquire as to the lawful purpose of the Act, but also whether the damage amounts to a taking. If it does, the Constitution provides a remedy, - just compensation. (a)

Interfering with a easement. Interfering with the rights appurtenant to property is a taking within the meaning of the Constitution, and easements are among the rights appurtenant to property. When public works destroy such easements

(a) Crawford v Village of Delaware, 7 Ohio St. 459

compensation must be made. An instance of this is given in *Willey v Norfolk & Southern Railroad* (a). In this case the plaintiff had a right of way across the defendants road bed. the defendant company obstructed this right of way, and when the bars were cut down by the plaintiff, repeatedly put them up again. The Court held this a burden upon the owner of the easement and a taking of his property (b). One having a mere parol license to hunt and fish, has no such interest as entitles him to compensation (c).

Injuries by blasting. It is a common practice in the construction of public works to resort to blasting, and frequently large quantities of debris are thrown upon the adjoining land. This is a violation of the right of exclusion and compensation must be made in some form or other. As to the method of making compensation the cases differ. Some hold that compensation was included in the original award, and that separate actions will not lie. (d) The better cases hold, however, that inasmuch as the consequences of the blasting were not foreseen and provided for in the original award separate action will lie for the additional burden imposed upon the

(a) 96 N.C.408.

(b) This principle is also strongly set forth in *Arnold v Hudson River R.R.Co* 55 N.Y.601, affd in *Story v N.Y.Elevated R.R.Co*, '90 N.Y. 149.

(c) *Bird v Great Eastern R.R.Co.* 34 L.J.C.P.366. See also *Boston Gas Co. v Old Colony & Newport R.R.* 14 Allen 444

(d) *Sabin v Vermont Central Ry*, 25 Vt.363. *Dodge v County Commissioners* 3 Metc.380. *Whitehouse v Androscoggin R.R.Co.* 52 Me,208.

property (a). Of course in the case that damage is done to the land of a person from whom there was no taking originally, and to whom no award has been made, the grounds for his recovery, under either of the previous holdings, are clear.

Justifiable Entry upon Land. The rights of property give the owner power to exclude from his land any person that he may see fit, but certain cases may arise where an entry is necessary in order to prosecute some public work or in some way to promote the ends of government. According to *Orr v Quimby* (b) such entry must be necessary, made with the least possible injury, and continued only a reasonable time. If entry is made in accordance with the above, it does not constitute a taking of property. If possession be continued an unreasonable time, the person making the entry becomes an trespasser ab initio (c). He cannot make experimental works or excavations. (d) The following have been held to be justified by necessity and not a taking of property. Preliminary surveys (e), measuring public boundaries (f), and United States Coast Surveys (g),. In many states this question is

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- (a) *StPeter v Dennison*, 58 N.Y. 416. *Carman v Indiana*, 4 O.St. 399
 (b) 54 N.H. 590
 (c) *Cushman v Smith*, 34 Me. 247.
 (d) *M & E R.R. Co v Hudson Tunnel Co.* 25 N.J.Eq. 384.
 (e) *State v Seymour*, 35 N.J.Law 47 at 53.
 (f) *Winslow v Giffard*, 6 Cush 327
 (g) *Orr v Quimby*, 54 N.H. 590.

regulated by statute.

Incidental Injuries to business. Loss and inconvenience resulting from the temporary obstruction of highways by reason of public improvements do not constitute a taking, when carried on in a proper manner. The reason for this lies in the superior right of the public to make improvements (a).

Right of Exclusion. Any invasion of property, whether above or below the surface is a taking, thus -constructing a ditch (b) passing under land with a tunnel(c), laying water pipes in the soil etc, are all such burdens as make compensation necessary. Public authorities cannot interfere with a private way save upon making compensation (d).

Right of Support. Every owner of land has a right to the lateral support of the soil in its natural condition, and public excavations so near the land of a private individual that his soil is undermined and slides off, constitutes a taking of property, as much as if the property itself had been invaded. He has a right, good against all the world, to have his land stand firm. (e) This doctrine has been denied in Maine and

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- (a) Northern Transportation Co. v Chicago, 99 U.S. 635. No damages can be allowed for injuries to business. Texas & St Louis Ry v Matthews, 60 Texas 215. Hooker v New Haven & North-Hampton Co, 15 Conn 312.
 - (b) People v Haines, 49 N.Y. 587.
 - (c) Sparrow v Oxford Co. 2 DeG, McN. & G. 94.
 - (d) Morse v Starker, 1 Allen 150
 - (e) Gilmore v Driscoll, 122 Mass, 199.

Kentucky on the ground that the act of the legislature, authorizing the public work, was a license, and negligence only would render liable (a).

Pollution of the Atmosphere. Everyone must use his property in such a manner as not to interfere with the rights of others. If, therefore, an owner of land discharges smoke, dust, or noxious vapor into the air, and it interferes with his neighbor's enjoyment of property, it is a nuisance (b). But where a business authorized by legislative act interferes with the right to pure air, it is a taking of property (c).

Franchises. A franchise may generally be defined as "a special privilege conferred by government upon individuals, which does not belong to the citizens of a country generally as of common right (d). Examples of franchises are the right to construct, maintain and operate a ferry, turnpike, canal, telegraph line or street railway, and are of two classes. First, exclusive franchises, for instance, one forbidding any other person or corporation from engaging in the same business within certain territory. Second: non-exclusive franchises where the grant is silent in the above respect.

The principal way in which a franchise can be taken is by impairing its value, so we can dispose of non-exclusive

(a) Boothby v Androscoggin Ry. 51 Me 318. Hortsman v Covington &c Ry, 18 B Monroe (Ken) 218.

(b) Wood on Nuisances.

(c) Suffolk v Parker, 79 Va, 660. Morgan v Binghamton, 32 Hun 602

(d) Bank of Augusta v Earle, 13 Peters 595.

franchises very easily. Incidental damage to a non-exclusive franchise by a rival company has been settled by a leading case of this nature, *The Charles River Bridge v Warren Bridge* (a) and another good case in point is that of *Fort Plain Bridge Co. v Smith* (b). Here the plaintiff had a toll-bridge, and defendant erected a free bridge only forty-nine feet away. It was held that he had no remedy.

Where the franchise is exclusive the question arises as to what impairment of value will amount to a taking. The franchise is a contract between the corporation and the state, so a subsequent grant of a similar franchise within the prescribed limits would be impairing the obligation of such contract, and would be void, and the exercise by a rival company, under legislative grant, would amount to a taking (d).

Taxation and Police Power. In the first chapter the difference between eminent domain, taxation, and the police power has been fully discussed, but, nevertheless, it has often been thought to prove a taking under the guise of these powers. While at first glance it may often seem that the interferences with property by them would constitute a taking, yet when we

(a) 7 Pick. 344.

(b) 30 N.Y. 44

(c) *Dartmouth College v Woodward*, 4 Wheaton 625

(d) *Boston & Lowell Ry. v Salem & Lowell Ry* 2 Gray 1. *Power v Village of Athens*, 99 N.Y. 592.

yet when we stop to think of the general differences between these powers, and that of eminent domain, the problem is not so difficult after all. The only cases where taxation has been held to be a taking are cases of assessment for local improvement, and the annexation of farming land to a city for the purpose of increasing the taxable property, but the current of authority is the other way. The question must largely depend upon the jurisdiction in which it arises. Under the police power the only case that nearly approaches a taking that I have been able to discover was a case, where in draining swampy land pipes were laid across the land of another (a), and this case can, in reality, be taken outside the police power entirely, and based upon other grounds.

(a) Cavanaugh v Boston 139 Mass, 426.

CHAPTER IV

WHAT CONSTITUTES A TAKING.

STREETS AND HIGHWAYS.

In General. Streets are laid out primarily to accomodate the public, by facilitating travel from place to place, but there are other uses to which streets are put, especially in populous places, which, when considered as a benefit to the highway are of positively no use whatever, but which, nevertheless, are vastly beneficial to large numbers of citizens along the street. It is with these we have to deal in this chapter. Nothing placed below the surface of the street is apt to place any obstacle in the way of travellers, but when we arrive at the consideration of structures built in the streets, as elevated railways, telegraph poles and the like, we are met with a problem which largely depends upon the actual facts of the case in issue. We will first consider the cases of improvements under the surface of the street, reserving for consideration later in the chapter, the question of other obstructions.

Sewers and Drains. It is absolutely essential for the health of the public that the refuse of the city be carried away, and it is the duty of the city authorities to provide suitable drains for so doing. They may use the streets for

this purpose by constructing sewers beneath the surface, and this imposes no burden upon the adjoining lot owners (a). Open drains for carrying off surface water may also be constructed (b)

Water Pipes and Gas pipes. A supply of pure and wholesome water is indispensable to the health and well being of all people. Streets are properly used when pipes are laid below the surface for this purpose (c). As to water pipes in a country highway I have been unable to find authority, but judging from an analogous case (d), where the laying of natural gas pipes in a public highway was held to be an additional burden, I should say that such use of the highway would constitute a case for compensation. The use of city streets for gas pipes is universal, and along this same line steam pipes or underground conduits for electric wires will be permitted (e).

Telegraph and Telephone Lines. A city cannot grant the right to place telegraph and telephone poles in its streets without the consent of the legislature (f), but where such consent is obtained the question becomes one of fact as to whether

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- (a) Cone v Hartford, 28 Conn. 363.
 - (b) White v Yazoo City, 27 Miss. 357
 - (c) Crook v Flatbush Waterworks Co., 29 Hun 245.
 - (d) Bloomfield Gas Co. v Calkins 62 N.Y. 386.
 - (e) Carli v Railroad Co. 28 Minn. at 376.
 - (f) Telegraph Co v Newark, 49 N.J. Law 344.

there is a taking or not, for the poles may be so placed as to avoid all damage to property by shutting off access to it from the street. Where they do interfere in the slightest manner there is a taking, for the use of poles in the street is foreign to the ordinary purpose of the street, and the abutting owner may recover for the additional burden placed upon his land. (a)

Public Markets. In many cities of our country it is customary to have a certain place set aside as a market where hucksters and others can dispose of their wares. When a portion of a street is devoted to such purpose the adjoining owner is entitled to compensation for his property which has been damaged. (b)

Street Grade Cases. These cases arise from necessary improvements in the streets, as towns and cities grow, and changes become necessary to meet the new conditions of things. Grades must be raised or lowered. New streets laid out and improved, and general changes made. The usual doctrine in the United States is that where a grade is raised or lowered and there is no physical injury to the abutting property, there can be no recovery of damages, when the change is a proper one and authorized by law. This doctrine was first promulgated in the case of *Callender v Marsh* (c), and is followed in almost.

(a) *Board of Trade v Barnett*, 107 Ill. 507
N.J. Telephone Co., 42 N.J. Eq. 141.

(b) *State v Lavanac*, 34 N.J. Law, 201

(c) 1 Pick. 417.

Broome v N.Y. &

all other American states(a). A long line of Ohio cases hold the contrary doctrine, and permit recovery, claiming that such acts constitute a taking. The power to change grades is a continuing one, and rests with the municipal authorities to be exercised by them for the public benefit, but where a city establishes a grade and pledges that such grade shall not be changed, the city will be compelled to fulfill to the letter its agreement(b), and in all other cases of unlawful (c) or negligent(d) changes of grade, the abutting owner can recover. Where the street is lowered so much that the lateral support of the soil is destroyed, the early cases hold that the abutting owner has no remedy, but later, and it seems to me better, cases hold that compensation must be made (e), or that a retaining wall be built in the street itself. Neither has the city the right to encroach upon the property of the adjoining owner by dumping refuse so that it will fall upon his land or turning surface water so that it will form a stagnant pool on his land (f). As a general proposition a city interferes with the flow of a natural stream at its peril.(g)

Vacating Streets. A municipal corporation has inherent power to vacate streets as the occasion may demand, but when

(a) Radcliffe's Exrs v Mayor of Brooklyn, 4 N.Y. 195

(b) Goodall v Milwaukee, 5 Wis. 32.

(c) Hill v St Louis, 59 Mo 412.

(d) North Vernon v Voegler, 103 Ind. 314.

(e) Keating c Cincinnati, 38 O.St. 141.

(f) Nevins v City of Peoria, 41 Ill. 502.

(g) Dore v Milwaukee, 42 Wis, 108.

in so doing, they deprive a property owner of means of access to his property, compensation must be made(a).

Street Railroads.-- General observations. The street railway problem has been one of the most fruitful sources of litigation connected with the entire subject of eminent domain, and, in many cases, great hardship has been worked to the owner of the abutting property by such roads, which, while they are undoubtedly of value to the travelling public, often damage property by smoke, cinders, noise etc., and often, especially in the case of elevated roads, by shutting off light and air. As every one has a right to choose whatever mode of locomotion he pleases, and as street railways are creatures of legislative sanction only, we must conclude that they are not legitimately in the highway because not constituting a use for which highways were designed. Therefore in order that a railway may occupy a street some legislative action is necessary, and the terms prescribed by the legislature must be strictly followed(b)

Railroads across highways. In highways the abutting owner has always certain rights whether the fee rests in the public or whether the public has merely an easement therein. When a railroad crosses the highway it often cuts off certain of these

(a) Transylvania University v Lexington, 3 B. Monroe (Ken) 25.
 (b) Lewis on Eminent Domain, # 110 - 118 inclusive.

rights no matter if on the surface above the grade or by subway. These crossings often necessitate a taking of property for lateral approaches, and as these purposes are for the sole benefit of the railroad company, and do not improve the street in any way, it necessarily follows that compensation must be made (a), but, as a general proposition, when the fee to the street is in the municipality, the municipality itself cannot recover unless the railroad is unlawfully in the street.

Steam and Elevated Railroads. It can be readily seen that the operation of a steam railway is not within the contemplated uses to which streets were to be put, and such use is only granted by legislative authority. The use of steam in the highway to propel cars is a source of lasting annoyance and damage to owners of property along the route, for escaping steam and cinders, vibrations of the soil etc. caused by the running of trains are not to be reckoned as a legitimate use of the highway such as is possessed by ordinary travellers. When the fee to the highway is in the abutting owner he may recover for the additional burden (b). These same principles that apply to surface roads are also applicable to elevated roads. If the fee to the street is in the abutting owner, he can recover as in the case of steam railroads, but if the fee is in the public he is still entitled to compensation for

(a) *Starr v Camden R.R.* 24 N.J.Law.592. *Commonwealth v Hartford and New Haven R.R.* 14 Gray 379.

(b) *Pacific R.R.Co v Reed* 41 Cal.256. *Ford v Santa Cruz*, 59 Cal 290.

loss of light and air, for these cumbersome structures in the streets are frequently very detrimental to business and interfere with the enjoyment of one's property. The leading cases illustrating this principle are to be found in *Story v N.Y. Elevated Ry Co.* (a) and in *Lahr v Metropolitan Elevated Ry* (b), but other states follow with cases nearly as emphatic, so we may regard the law on this point as practically settled.

Horse Railways. Most courts are inclined to put horse-railways within the legitimate uses of the street, placing them more upon the footing of cab or omnibus lines, and so deny compensation to the owners of property along the street (c), but New York in a line of excellent cases denies the right to operate horse-railways without compensation any more than other railways, placing all upon an equal footing when the fee is in the adjoining owner, but when the fee is in the public the abutting owner is denied compensation (d), and has no recourse to the courts of law.

(a) 90 N.Y.122

(b) 104 N.Y.268

(c) *Atty Genl v Metropolitan R.R.* 125 Mass 515. *Carson v Central Railroad Co.* 35 Cal.325.

(d) *Craig v Rochester R.* 39 N.Y.404.

C H A P T E R V

WHAT CONSTITUTES A TAKING.

WATER AND WATERCOURSES.

General observations. In considering the question of water and watercourses we are confronted at the outset with several conditions which demand our attention, and these conditions are largely due to the navigability or non-navigability of the watercourse in question. A watercourse may be roughly defined as "a stream with well defined banks and bed in which water habitually flows" Of these certain streams are navigable and others are not. Of the navigable streams certain of them are open to the pleasure of the public at large, while others are controlled entirely by private owners. In this chapter the status of each class will be examined and commented upon.

Rights of Riparian Owners in the flow of a Stream. We start this discussion with the well known fact that every riparian proprietor has a right to the flow of the stream in undiminished quantities, and this is true both as to public and private waters (a). This being the case any interference with, or

(a) *Lux v Haggin*, 69 Cal. 250

pollution of a stream by an exercise of eminent domain is a taking, and must necessarily be compensated for. There are various methods of interfering with the flow of a stream which we will separately consider:

A

BY TAKING THE WATER FROM ABOVE. Loss of water itself constitutes a taking, and any diminution from above contributes to the wrong. If done by a private person the remedy is injunction and damages. If done by an exercise of eminent domain, the remedy is compensation for the taking. The property owner has been deprived of a natural and inherent right. Thus - water diverted for a city supply(a), canal(b), water tanks of railroad company in unreasonable quantities(c), ditches to improve the highway(d), and improvement of navigation (e), are all held to be a taking. The manner of taking and the purpose for which taken does not matter. It is the loss of the water that constitutes the injury.

B.

INCREASING THE FLOW OR DIVERTING THE CURRENT. The leading case upon this point is Mayor of Baltimore v Apphold(f), where the city proposed to turn into a small stream, running through

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- (a) Aetna Mills v Brookline, 127 Mass, 69
 - (b) Heilman v Union Canal Co. 50 Pa St. 268.
 - (c) Garwood v New York Central, 83 N.Y. 400
 - (d) State v Supervisors, 66 Wis. 199
 - (e) 1 Abbott 246, Avery v Fox. Contra 29 Miss. 21.
 - (f) 42 Md. 442.

defendant's land, a large quantity of water to supply a reservoir. This additional amount would overflow and materially damage the defendant's field. An injunction was granted until the city regularly acquired the land by condemnation proceedings.

On the same principle also a person may make reasonable use of the water as it passes his land, even diverting the course of the stream, but he must return it to its old bed, and it must reach his neighbor below in undiminished quantities, and as it was wont to flow by nature. Thus, where a booming company dammed a stream taking all the water for certain periods and then letting it off in splashes for the purpose of floating logs, a saw mill owner below was held to be deprived of a valuable property right (a). Other changes in the current also entitled to compensation when they damage private property, and bridges are the most common causes of such changes in the current (b).

Works setting back the current by raising the water and flooding property also constitute a taking, and entitle the owner of the flooded lands to compensation (c), as do works polluting the waters of the stream. Common examples of this are discharges of foul water from a paper mill, sawdust from a manufacturing plant (d), noxious matter from sewers (f) and the

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- (a) Thunder Bay Booming Co v Speechly, 31 Mich, 336.
 - (b) Rowe v Granite Bridge Company, 21 Pick. 344
 - (c) Grand Rapids Booming Co v Jarvis, 30 Mich, 321 Affd. in Thompson v Androscoggin River Imp Co. 54 N.H. 545.
 - (d) Gladfelter v Walker, 40 Md 1
 - (e) Merrifield v Lombard, 13 Allen 16.
 - (f) Hooker v Rochester, 37 Hun 181.

like.

What are public streams. At common law all streams and waters in which the tide ebbed and flowed were regarded as navigable and the soil below high water mark was public property (a) The reason for this was probably owing to the fact, that England's navigable streams were mostly of this character. In adopting the Common Law of England we found that this particular part of it would not fit well into our changed conditions owing to the fact that America has scores of navigable rivers where this condition does not exist, and in many American states a navigable stream is regarded as one useful for purposes of navigation and commerce without regard to the tide at all. But many states hold to the English rule. All we need to remember is that in a public navigable stream the title to the bed of the stream is in the public, and the title to the great freshwater lakes is in the public from low water mark.

Rights of Riparian Owners in Public Navigable Streams. An Act of the Legislature making a private stream navigable and public does not cut off any of the rights of a riparian owner in the use of the water (b), but their rights are subject to the paramount rights of the public to use and improve the stream as a highway. This public right is merely a sort of easement

(a) Angell on Watercourses # 542-551.

(b) Walker v Board of Public Works 16 O/540.

to pass and repass, -nothing more(a) The New York Court of Appeals said "The legislature, except under the power of eminent domain, can interfere with such streams only for the purpose of regulating, preserving and protecting this public easement. It has no more power over these fresh water streams than over other private property. It may make laws for regulating dams, ferries and bridges only so far as is necessary, and when it goes further it invades private rights protected by the Constitution" The whole thing is in this case very well stated, and if these rights are invaded under the exercise of the powers which the Legislature has, compensation must be made (b). The public easement includes the right to improve the channel for purposes of navigation, and is limited to the bed of the stream(c).

Interfering with the flow of the stream. New York holds that the public has the absolute right to appropriate the water of public streams in any way it sees fit without compensation to the riparian owner(d) This seems to be a hard rule, and gives the state power to work unlimited mischief if it should choose so to do, for all the water of a stream might be taken, leaving the owners below without a remedy. This New York rule does not seem to be a general one and exactly the same

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- (a) *Chenango Bridge Co. v Paige*, 83 N.Y.178.
 (b) *Canal Commissioners v Kempshall*, 26 Wend.404.
 (c) *Lewis on Eminent Domain* #71.
 (d) *Canal Commissioners v The People*, 5 Wend.423.

rules regarding the flow exist as in the case of private streams(a).

Riparian Owners on Public Waters. The state holds the title to public waters as a sort of trustee for the use of the public in common. But the riparian owner has certain valuable rights appurtenant to his estate which must not be destroyed. He has the right to navigate the stream, fish, use the water in his business land boats at his property and the right to an unobstructed access to the channel of the stream(b). These riparian rights are property and cannot be taken away without paying just compensation therefor. A railroad, between high and low water mark even though authorized by the legislature cannot exercise this right without making compensation to the abutting owners(d), nor can a city dump mud and debris in the stream in front of private property so as to cut off access to the channel. If any of these things are done by legislative authority, it is a taking of a valuable right which is the private property of the riparian owner.

Sewers. Although the cases are almost uniform in holding that a city is not liable for failure to provide a sufficient system of sewerage, yet the discharge from sewers must be made in such a manner as to injure no one. If a sewer be discharged

(a) Myers v St Louis, 8 Mo App. 266. Commonwealth v Boston & Maine R.R., 3 Cush. 25.

(b) Yates v Milwaukee, 10 Wall. 497.

(c) Union Depot Co. v Brunswick 31 Minn. 297.

(d) Railway Co v Renwick 102 U.S. 180.

upon private property(a) into a private canal (b), or mill-pond(c) or into any water so as to prevent access to a wharf by mud or filth(d) the city will be liable.

Percolation Etc. Causing water to flow upon land is a clear violation of the right of exclusive enjoyment which every owner of land possesses. Thus percolation or seeping of water from a mill-pond, canal or reservoir, which causes damage to adjacent property is a taking of property (e), as in the case where water escaped from the tank of a railroad company and froze upon plaintiff's land(f).

Surface Water. Surface water is water that falls upon the earth and flows naturally by force of gravity till it reaches some watercourse or sinks into the earth/ Generally speaking, an owner of land has no right to dam up his land so as to prevent the water from a higher proprietor flowing naturally upon his land/ The lower proprietor has a sort of servient tenement, and in turn he has a sort of dominant tenement over the property below in the right to get rid of the water by allowing it to flow as it will. The decisions are by no means uniform, however, for many states hold directly opposite as the rules governing property differ in the several

(a) Smith v Atlanta, 75 Ga 110.

(b) Boston Rolling Mills v Cambridge, 117 Mass, 396.

(c) Mills v Nashville, 63 N.H. 42

(d) Haskell v New Bedford, 108 Mass, 208

(e) Ellington v Bennett, 59 Ga. 286.

(f) Chicago and Northwestern Ry v Hoag, 90 Ill. 339

states.

Certain interferences with surface water in the exercise of eminent domain, constitute a taking of private property. A railroad company must not build its embankment in such a manner as to dam up surface water, and set it back in stagnant pools upon the lands of a neighboring proprietor(a), and, in general, collecting water and casting it off where it has not flowed before is taking(b) Municipal corporations are also liable upon the same grounds in the execution of a public work. Subterannean waters may in general be put in the same class as percolating waters(d), but pollution of such waters will not be allowed any more than of a stream upon the surface of the earth(e) Neither has any person a right to remove any natural barriers that protect his neighbors land from the action of water.(f)

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- (a) Gillham v Madison County R.R.Co. 49 Ill.484.
 - (b) Crawfordsville v Bond, 96 Ind.236.
 - (c) Bowman v New Orleans, 27 La. Ann. 501.
 - (d) Lyke's Appeal, 106 Pa St.626.
 - (e) Ballard v Tomlinson, L.R.29 C.D.115.
 - (f) Eaton v B M & C R.R. 51 N.H.504.

C O N C L U S I O N .

Having now given a more or less imperfect outline of the cases bearing upon the subject of ~~what~~ constitutes a taking of private property for a public use, we cannot but look back with gratitude to the framers of our Constitution, who so early in our public career, before the advent of railways, steamboats, electricity, ~~telegraph~~ and telephone companies and other modern inventions, foresaw and provided against the oppression of private citizens, by inserting in the Constitution these provisions, even though the word "taking" has proved such an ambiguity and a fruitful source of litigation. Their prudence, sagacity, and foresight ordained the true bulwark of American liberty, for without such proper check anarchy and misrule would lead the country to ruin. These provisions have gone through stormy scenes and have always triumphed, and the present effort only echoes the conclusions reached under them. May our gratitude for these safeguards, and our honor for those who framed them continue to grow as each successive obstacle is overcome.